(c) and/or to declare that the Annual General Meeting of the Football Association of Selangor held at the Selangor Club, Kuala Lumpur, on the 6th day of February, 1960, is *ultra vires* the Rules and therefore void and of no effect.

(d) to authorise the respondents to defend this application on behalf of the Football Association of Selangor.

The respondents were stated to be the members of the Committee of the Football Association of Selangor, a Society registered under the Societies Ordinance, 1949. I take it that the respondents are registered as officers for the current year with the Registrar of Societies and therefore it is sufficient to proceed against the Football Association of Selangor in the name of one of the officers under the provisions of the Societies Ordinance 1949 section 26A(b) in the event of the Society not having declared one of its members to the Registrar of Societies as the person in whose name the club may be sued.

The granting of interlocutory injunctions is provided for under Order 50 r. 6 of the Rules of the Supreme Court. It is quite impossible to have an interlocutory injunction unless there is a suit pending nor is it possible for the Court to decide the other issues in the Notice of the Motion.

The relief that the applicant is asking for in these proceedings can only be decided after the calling of evidence to establish whether or not the Annual General Meeting was lawfully constituted and whether or not the election of the officers was in accordance with the constitution of the club. These are pure matters of fact. In *Foon Seong* v. *Chan San Choon,*[1] Bostock Hill J. said:

"What the plaintiff is really asking is for a decision as to whether there was a valid trust by Foong Onn Kwan (deceased) in favour of the plaintiff. Mr. MacDuff was unable to cite any authority to show that procedure by way of Originating Summons under section 467 (1) was an appropriate form of procedure in such a matter and I am of the opinion that the application is misconceived, and that the plaintiff cannot in an Originating Summons based on an alleged trust ask for evidence to be heard to prove that trust. Moreover the question at issue is a question of fact and not of law and will have to be determined in open court and is not suitable for determination by the procedure of Originating Summons."

Order 1 r. 1 of the Rules of the Supreme Court provides that unless otherwise provided for all proceedings of a civil nature in this court must be by way of action and Order 2, r. 1, provides that every action shall be commenced by writ. Unless therefore the applicant can bring himself within the other provisions he must of necessity commence his action by writ. But since this case is bound to turn on an issue of fact which will have to be established by the examination and cross-examination of witnesses procedure by way of Originating Summons even if this case could be brought within the provisions of Order 54A r.1. would not be suitable or proper. I am supported in my contention by a judgment of Buhagiar J. in *Choo Yin Loo & Ors.* v. *Registrar of Societies, F.M. & Ors.*[2] In that case there was a dispute as to the legality of the passing of certain amendments to the rules. The learned Judge said at the end of the judgment:

"The proper remedy in this case is for the members of the Association to contest the validity or invalidity of the meeting of the 4th December, 1955, before a competent court and indeed there is a suit pending whether this matter is in issue."

There are two English cases in which the relief prayed for is similar to the present case viz: *Dawkins* v. *Antrobus,*[3] and *Thelluson* v. *Viscount Valencia.*[4] Both these cases were actions started by writ with a statement of claim and the actions proceeded to trial.

What the applicant should have done in this case was to have taken out a writ and if he wished to ask for an interlocutory injunction to have served notice of motion asking for an interim injunction with the service of a writ. For the above reasons I decided that the procedure adopted in this matter was misconceived and I therefore dismissed the application with costs.

Application dismissed.

NG KIM PONG v. YEOW KIM PONG REALTY LIMITED

[C.A. (Thomson C.J., Smith and Ong JJ.)
May 11, 1959]

[K. L. — Civil Appeal No. 21 of 1958]

Contract — Part-payment — Non-Payment — Time not essence of the contract — Rescission of contract — Whether entitled.

Contract (Malay States) Ordinance, 1950, ss.56 and 92.

The plaintiff appealed against a judgment dismissing his claim for the return of moneys paid by him and for damages for breach of contract for sale and purchase of land.

On March 24, 1956 the plaintiff entered into an agreement to purchase from the defendants 22 building lots for the sum of $66,000 and made part-payment of $15,000 towards the purchase price. Clause 2 of the agreement provided for payment of a further portion of the purchase money amounting to $24,000 on or before June 23, and the balance of $27,000 on or before December 23, 1956. The plaintiff failed to pay the $24,000 due on June 23 and on June 25 the defendants sought to forfeit the part-payment and to claim damages sought to forfeit the part-payment.

On the same day that he received the notice of forfeiture (June 25) the plaintiff wrote to the defendants requesting an extension of time of one month to pay them the $24,000. The defendants intimidated that they agreed to an extension of time provided the plaintiff paid $5,000 on or before 7th July and the balance of $19,000 by July 31. The plaintiff duly paid the $5,000 on July 7. In order to obtain his receipt the plaintiff was forced to sign an acceptance of certain conditions, one of which was that construction work must have begun on any land sought to be transferred.

Subsequently the plaintiff found 2 persons willing and able to buy 8 lots for $24,000 which sum they deposited with a solicitor. The plaintiff informed the defendants of this fact and requested them to send the titles for examination by the solicitor for the purchasers.

The defendants did not send the titles but insisted on the commencement of building operations. This resulted in an impasse and the purchasers withdrew their money from the solicitor. On September 1, the defendants sought to terminate the contract, on the grounds that the plaintiff failed to fulfil his obligations, and claimed that all moneys paid should be forfeited.

The plaintiff, however, did not accept rescission of the contract and on September 8, managed to raise $19,000 for payment against delivery of the required documents of title which sum the defendants refused to accept.

Held: (1) the plaintiff was not in breach of any of the terms of the original contract, except only as to the date of payment of $24,000 by June 23. On that particular point the breach had been waived by the defendants when they accepted the payment of $5,000 and extended the time for the payment of the balance of $19,000 to July 31;

(2) the plaintiff's non-payment of the $19,000 by July 31, did not entitle the defendants to rescind because time was not the essence of the contract as evidenced by the defendants' letters of July 31 and August 10;

(3) the defendants were not on September 1 entitled either to rescind the contract or to forfeit the plaintiff's money;

(4) the defendants' repudiation of the contract not having been accepted by the plaintiff, the contract was still subsisting;

(5) the defendants were themselves in breach of contract by refusing to complete the transactions.

Cases referred to:—

(1) *Hipwell* v. *Knight* 4 L.J. Eg. 52; 102 E.R. 163.

(2) *Balkishen Das* v. *Legge* 27 I.A. 58.

COURT OF APPEAL

L. P. Thean for the appellant.

R. H. V. Rintoul for the respondent.

Ong J. (Thomson C.J. and Smith J. concurring): This is an appeal from a judgment dismissing a claim by the plaintiff for the return of moneys paid by him and for damages for breach of contract for sale and purchase of land. The essential facts in this case are not in dispute.

On the 24th March, 1956 the plaintiff entered into an agreement to purchase from the defendants 22 building lots for the sum of $66,000 and made part payment of $15,000 towards the purchase price. Clause 2 of the agreement provided for payment of a further portion of the purchase money amounting to $24,000 on or before 23rd June, 1956 and the balance of $27,000 on or before 23rd December, 1956. In Clause 10 it was stipulated that in the event of the plaintiff failing to pay the said sums on the said dates the advance of $15,000 would be forfeited to the defendants and the agreement treated as null and void. The plaintiff failed to pay the $24,000 due on 23rd June and on 25th June the defendants wrote to him that "the advance payment of $15,000 has been forfeited to us as liquidated damages" and the agreement become null and void.

On the same day that he received the notice of forfeiture, that is, 25th June, the plaintiff, after personally interviewing the defendants, wrote to them requesting an extension of time of one month to pay them the $24,000.

A couple of days later defendants intimated that they were agreeable to an extension of time till 31st July provided plaintiff paid down $5,000 on or before 7th July and the balance of $19,000 on or before 31st July. On 7th July the plaintiff duly paid the $5,000 demanded of him. He repeatedly tried to obtain a receipt for this amount from defendants, and finally on 24th July was handed a letter only after he consented to sign his acceptance of the terms and conditions therein. According to plaintiff these terms and conditions were never discussed when his $5,000 was accepted on 7th July, but he had to sign because otherwise the defendants refused to give him his receipt for the money he had paid. The letter was ante-dated 7th July and reads as follows:

Lots 382 to 403 inclusive
Section 24, Town of Klang.

With reference to your letter of the 25th June, 1956 we are prepared to permit you an extension of time within which to pay the sum of $24,000 on the following conditions:—

1. To pay us a sum of $5,000 forthwith and the balance of $19,000 to be paid on or before the 31st July, 1956.
2. Construction work on the above land must be commenced within one week of the date hereof.
3. Construction must have begun on any land that is sought to be transferred.
4. Should there be any breach of the above conditions, the $5,000 abovementioned, if paid, will be forfeited and the extension of time withdrawn.

Further, full payment of the balance of $27.000 must be made on or before the 23rd December, 1956.

Yours faithfully,
Yeow Kim Pong Realty Limited.
(Sd) Yeow Kam Joo,
Managing Director.

I, Ng Kim Pong, acknowledge the receipt of the original copy of this letter and agree to the terms as stated.

Ng Kim Pong
5 p.m. 24/7/56.

Subsequently the plaintiff made efforts to raise, and did succeed in raising, the balance of $19,000 which was due for payment by 31st July. He found two persons, Yap Kim Kee and his partner Goh Swee Hian, willing and able to buy 8 lots for $24,000 which sum they deposited with Mr. Yong Kung Lin, a solicitor of long standing in Kuala Lumpur, on 27th July. On the following day, Messrs. Braddell & Ramani, on behalf of the plaintiff, wrote to the defendants that the plaintiff had found purchasers for 8 lots, Nos. 382 — 389, and that the purchase price had been deposited with Mr. Yong Kung Lin. They further requested that the titles be sent to them in the course of the day for examination by the solicitor for the purchasers and added:

"Our client will thereafter be able to make payment of the balance due to you in the sum of $19,000 before the 31st July, as agreed. Please treat this letter as urgent and let us have the titles by return."

The defendants, however, did not send the titles, but on 31st July replied through their solicitors, Messrs. Shearn, Delamore & Co. as follows:

"Our clients instruct us that no building operations have commenced upon the land mentioned in your letter aforesaid and in accordance with paragraph 3 of our client's letter of the 7th instant addressed to your client, and to which your client concurred, there can consequently be no transfer of the land as at present advised.

Upon information that building operations have commenced upon the lots in question, our clients will be happy to comply with your client's request."

On 3rd August Messrs. Braddell & Ramani wrote to Messrs. Shearn, Delamore & Co., the material passage being:

"Will you let us have a direct answer to our request in respect of the 8 titles immediately required. In any event we wish to remind you that building operations on these 8 lots which are in fact ready to be commenced, will not be commenced by the purchasers unless they are satisfied about the titles and can lawfully go upon the land. This is what our client is endeavouring to get done."

On 10th August Messrs. Shearn, Delamore & Co. replied to the above:

"Our clients are prepared to permit your client to inspect the titles at any time at their offices, but until building operations are commenced they cannot see their way to transfer the lots in question."

The defendants' insistence on the commencement of building operations resulted in an impasse, the purchasers withdrew their money from Mr. Yong Kung Lin, and on 1st September the defendants' solicitors gave notice to the plaintiff that no action having been taken by him to fulfil his obligations under the contract, or to pay the sum due to their clients, the contract was therefore terminated by reason of his breaches, and all moneys paid were forfeit, and he was requested to vacate the land forthwith since he had become a trespasser.

The plaintiff, however, did not accept rescission of the contract and on 8th September managed to raise $19,000 from his own resources and to deposit that amount with his own solicitors, who immediately notified the defendants' solicitors that this money was available for payment against delivery of the required documents of title. Then followed a conference on 13th September, attended by the plaintiff, the defendants' secretary, and the solicitors for the parties, which resulted in the $19,000 being deposited with the defendants' solicitors on 19th September, to be retained by them until the titles should be handed over for completion of transfer. During the ensuing fortnight it would appear that the defendants' only reason for not proceeding with the transfer was that they were now concerned with imposing an entirely new and further obligation on the plaintiff, namely, that he should undertake to make all houses proposed to be built on the lands in question available for purchase by tenants of the defendants who were in occupation of the defendants' own houses elsewhere. In fact the defendants were now insisting on something entirely outside the terms of the contract, and which was not one of the conditions set out in the letter of 7th July. Nevertheless, the plaintiff was prepared to be accommodating, and by 2nd October the discussions had reached a stage where the defendants' own solicitors were able to write to the plaintiff's solicitors as follows:

"We confirm the telephone conversation of even date between Mr. Williamson and Mr. Bentley in which it was agreed that you would draft a new circular to be sent to the existing tenants of the land in question.

Upon the terms of the same being agreed and upon evidence of posting of the same to the existing tenants, our client will be happy to conclude the matter."

On the following day, 3rd October, the plaintiff's solicitors sent the draft of the new circular for the defendants' approval. On 4th October the defendants' solicitors replied that they had sent the draft to their clients and expressed the hope that they would "very soon be in a position to finalise the matter." During the weeks that followed the defendants, in spite of repeated requests, refused to reply or give any indication whether they approved or rejected the draft circular or desired any amendments thereto. Finally on 7th November, the plaintiff's solicitors gave notice of intended action for breach of contract and demanded refund of all the deposits which the plaintiff had paid.

On the 14th November the defendants' solicitors sent to the plaintiff's solicitors a copy of their own letter to their clients which reads as follows:

Re: NG KIM PONG

"Further to the recent conversation between Mr. Tham and our Messrs. Rawson and Bentley, we confirm that unless we receives from you the titles in question together with blank transfers by Saturday, November 17, 1956, we shall have no option but to return the sum of $19,000 to Messrs. Lovelace & Hastings."

This letter, in my opinion, throws an illuminating sidelight on the conduct of the defendants in respect of the whole transaction. On 19th November the defendants' solicitors returned to the plaintiff's solicitors the $19,000 which had been lying on deposit for 2 whole months, and the plaintiff then filed action.

On the above facts the learned trial Judge gave judgment for the defendants, holding that they were entitled on 1st September, 1956 to rescind the contract and forfeit all the deposits paid to them on the following grounds, namely (1) that the plaintiff had himself committed a breach of the contract he signed on 24th July by failing to begin construction on the land sought to be transferred, and (2) that he had failed to pay the sum of $19,000 by 31st July. The plaintiff's claim was also dismissed on a third ground which will be discussed later.

With the greatest respect to the learned trial Judge it seems to me that before the defendants could be held entitled to rescind the contract by reason of the plaintiff's alleged breach of the construction clause (which was Condition 3 set out in the letter of 7th July), it must first be decided whether or not that condition was lawfully engrafted on the original contract between the parties, and was such that it was binding on the plaintiff.

In their notice dated 1st September the grounds on which the defendants relied for rescission of the contract and for the forfeiture were stated to be, firstly, that no action had been taken by the plaintiff to fulfil his obliga-

tions under the contract, and secondly his failure to pay the sum due. As to the first ground, the plaintiff in truth and in fact was not in breach of any of the terms of the original contract made on 24th March, 1956, except only as to the date of payment of $24,000 by 23rd June. On that particular point the breach had been waived by the defendants when they accepted payment of $5,000 to account on 7th July, extended the time for payment of the balance of $19,000 to 31st July and reaffirmed the contract. As to the second ground, non-payment of the $19,000 by 31st July in my opinion did not entitle the defendants to rescind. In the first place, payment by that date was not of the essence of the contract. This is unmistakably clear from the defendants' solicitors' letters of 31st July and 10th August. In any event these letters waived such stipulation, if there were any (see *Hipwell* v. Knight)[1]. In the second place, it does not lie in the mouth of the defendants to blame the plaintiff for the non-payment if they refused him reasonable facilities which would have enabled him to pay by 28th or 29th July, certainly before 31st July. There is clear evidence of this in the letters which passed between 28th July and 10th August, thus bringing this case within the provisions of section 68 of the Contracts Ordinance which is as follows:

> If any promisee neglects or refuses to afford the promisor reasonable facilities for the performance of his promise, the promisor is excused by such neglect or refusal as to any non-performance caused thereby.

In the third place, since the stipulation as to time was not of the essence, the said sum of $19,000 was again made available for payment to the defendants not later than 9th September and was in fact deposited with their solicitors on 19th September, for payment to the defendants if they would part with the 8 titles required by the plaintiff to be transferred. I should emphasise here that after 1st September the defendants had dropped all pretence that a condition precedent to the transfer of the 8 lots was that "construction must have begun on any land that is sought to be transferred." That point in fact dropped out from all discussions after 1st September as completely as if it had never existed at all, and therefore the defendants could not then have had any valid excuse not to transfer unless they could lawfully have rescinded the contract on 1st September as they purported to have done.

It is to be observed that the plaintiff's default, as specifically alleged in the notice of 1st September was "that no action has been taken by you to fulfil your obligations under the contract". If that is taken, as it obviously must be, to refer to Condition 3 in the letter of 7th July, that was a clause engrafted subsequently on the original contract, and its validity must be carefully examined.

In this connection I think the proper approach to the problem is to start by considering what was the position of the parties after the plaintiff's default in paying the $24,000 on 23rd June. Section 56 of the Contract Ordinance provides as follows:

> (1) When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.
>
> (2) If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.
>
> (3) If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so.

I think it cannot seriously be denied that Clause 10 did make time for payment of the essence of the contract, so that on 25th June the defendants could have lawfully rescinded the contract once for all and forfeited the $15,000 already paid to them. However, in the events that happened, the defendants did reaffirm the contract by acceptance of the part payment of $5,000, and by so doing it seems to me that the case thereafter comes within the provisions of sub-section 3 of section 56 of the Contracts Ordinance, *supra*. Under that subsection, "If . . . . the promisee accepts performance . . . at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless at the time of such acceptance, he gives notice to the promisor of his intention to do so."

All that this subsection gave to the defendants upon their reaffirming the contract was a right to compensation for any loss occasioned by the non-performance of the promise at the time agreed, and nothing more. It never entitled the defendants to impose penal conditions or a fine. Condition 3 is as follows: "Construction must have begun on any land that is sought to be transferred." How this condition was relied on expressly by the defendants on 31st July and 10th August to justify their refusal to transfer the 8 lots of which transfer was sought by the plaintiff. Compliance therewith must necessarily cause loss to the plaintiff without any imaginable corresponding gain or profit by way of compensation to the defendants,

and it could only benefit complete strangers to the contract with whom the defendants had no concern.

Whether the plaintiff himself, or a third party, was proposing to buy and take over the 8 lots, I cannot imagine how it could possibly be any concern of the defendants as transferors that construction must have begun on these lands. Whether or not the condition was performed would not have made the defendants a penny the richer or poorer. I have no doubt, therefore, in my mind that Condition 3 was a penal condition of the purest type, and because it could have no possible relation to compensation for any loss sustainable by the defendants it is therefore entirely void. I have also no doubt that this condition was imposed only as a colourable pretext to be resorted to for the purpose of enabling the defendants to evade performance of the contract if and when they should think it profitable to do so. I feel I am entirely justified in coming to this conclusion because it is abundantly clear from the evidence of what took place after 1st September that the defendants had then dropped all pretence that it was any concern of theirs whether construction should have begun on any lands sought to be transferred or not.

I am fortified in my view that this condition ought to be treated as void and non-existent because if the plaintiff had then sued for specific performance of the 8 lots, the defendants could not, in my opinion, have resisted the claim by pleading the plaintiff's default in respect of this condition.

In the view that I have taken of Condition 3 it follows therefore (1) that the defendants themselves were in default from 28th July in refusing to transfer the 8 lots upon request made to them by the plaintiff to do so; (2) that the plaintiff had a valid excuse for not paying the $19,000 by reason of the defendants' letter of 31st July; (3) that the defendants were not on 1st September entitled either to rescind the contract or to forfeit the plaintiff's $20,000; (4) that the defendants' repudiation of the contract not having been accepted by the plaintiff, the Contract was still subsisting, and (5) that when the plaintiff left the $19,000 on deposit with the defendants' own solicitors from 19th September till its refund on 19th November, the defendants themselves were in breach by refusing to complete the necessary transfers.

I come now to the defendants' last line of defence, on which again the learned trial Judge had also given judgment in their favour. The hearing of this case was originally fixed for 8th March, 1957 but had on that date been adjourned by consent. Then certain matters came to the knowledge of the defendants on which they took appropriate action and on 21st June 1957 they filed an amended defence of which the relevant paragraphs are as follows:

"12. The plaintiff transferred the Agreement sued on to one Liew Thean Siew for $10,000 on the 10th day of May, 1956. This fact was unknown to the defendant prior to the 8th day of March, 1957.

"13. The defendant has on the 8th day of April, 1957 given notice to the plaintiff that the defendant accepts Liew Thean Siew as the assignee of the agreement.

"14. The plaintiff therefore had no rights under the Agreement sued upon at the date of the institution of this suit.

"15. The said Liew Thean Siew duly assigned the Agreement sued up for $1,500 to the defendant on the 8th of April, 1957."

The plaintiff in his Reply denied that the said Agreement was transferred to Liew Thean Siew for $10,000 as alleged or at all, but averred that it was deposited as security for a loan, the whole of which had been repaid before commencement of proceedings, and that Liew on 8th April, 1957 had no rights under the agreement and the defendants at all material times know that no such rights existed.

Since there has been much argument in this appeal, with copious citations of authorities, regarding the admissibility of evidence as to the true nature of the transaction of 10th May, 1956 between the plaintiff and Liew, I think it is essential that the document should be reproduced here in full. It bears the heading "Sale Deed" was stamped with *ad valorem* duty stamps as on transfer to the value of $100 and reads as follows:

"In consideration of the sum of Dollars Ten Thousand only ($10,000) paid to me by Mr. Liew Thean Siew of No. 70, Ampang Street, Kuala Lumpur which sum I do hereby acknowledge same.

I, the undersigned Ng Kim Pong of No. 37 Ceylon Lane do hereby sell and transfer the Agreement to Purchase dated the 24th March, 1956 between me and the Yew Kim Pong Realty Limited free from encumbrances, to the said Liew Thean Siew.

Dated this 10th day of May, 1956.

(Sd) Ng Kim Pong.

Received Cash ($10,000)

(Sd) Ng Kim Pong.

Witness:

(Sd)

10.5.56."

Mr. Rintoul, Counsel for the defendants strenuously contended, both at the trial and in the appeal, that this document must be accepted at its full face value, and that all evidence to the contrary is inadmissible under section 92 of the Evidence Ordinance, which provides that when the terms of any contract, grant or other

disposition of property had been reduced to writing —

"No evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms."

With all respect I am unable to accept this argument for reasons which are set out below:

In the leading case of *Balkishen Das* v. *Legge*[2] the following principle was laid down by the Privy Council:

"Their Lordships do not think that oral evidence of intention was admissible for the purpose of construing the deeds or ascertaining the intention of the parties. By section 92 no evidence of any oral agreement or statement can be admitted as between the parties to any instrument or their representatives in interest, for the purpose of contradicting, varying or adding to, or subtracting from its terms; subject to the exceptions contained in the several provisos. It was conceded that this case could not be brought within any of them. The cases in the English Court of Chancery, which were referred to by the learned judges in the High Court have not, in the opinion of their Lordships any application to the law of India, as laid down in the Acts of the Indian legislature. The case must therefore, be decided on a consideration of the contents of the documents themselves, with such extrinsic evidence of the surrounding circumstances, as may be required to show in what manner the language of the document is related to existing facts."

That principle is binding on this Court. I am, however, of opinion that it has no application to the facts of this particular case, because in *Balkishen Das* and in all the numerous cases where it was followed, the provisions of section 92 had to be, and had been, applied because the parties to the dispositive document were actually at variance as to the nature of the transaction. In the present case there were two parties to what on the face of it was an absolute assignment, but both parties were in no way disputing what the real transaction was between them. Instead they were indubitably agreed that the purported assignment was by way of security only for a loan of $5,000 advanced by Liew to the plaintiff. Therein to my mind lies an obvious distinction and, I may add, the essential difference between this and the many cases following *Balkishen Das* v. *Legge*. If one party to the dispositive document does not dispute the allegation of the other that the written word did not express the true intention of the parties, then, in my opinion, Section 92 cannot possibly serve any purpose, because its very *raison d'etre* has disappeared. Accordingly, when Liew said in evidence that he advanced $5,000 to the plaintiff and obtained by way of security the assignment of the contract between plaintiff and defendants, such evidence cannot be excluded by section 92. The plaintiff in his evidence has stated that he had repaid the $5,000 to Liew with interest, and paid the final instalment in September 1956 when he received back his original agreement with the defendants. Liew did not contradict the plaintiff's evidence, but only claimed that there was at the date he assigned the "Sale Deed" to the defendants still some money owing to him because the plaintiff had agreed to pay him $10,000 if the loan of $5,000 was not repaid in full within one month. Liew also stated "when I assigned the agreement in April 1957 I knew the agreement between plaintiff and defendant had expired." Therefore the only right, if any, that Liew still had against the plaintiff as on 8th April, 1957 was only a claim to an uncertain amount by way of interest which I very much doubt he could have recovered.

It then follows that the defendants could not, by their purchase, have obtained from Liew any better rights than he had himself. Consequently, if the defendants (in the words of Counsel) chose to take out "an insurance policy" by obtaining an assignment from Liew, such purported assignment is no answer to the plaintiff's claim.

In my opinion what I have stated above sufficiently disposes of the defendants' third and last line of defence. From another standpoint, however, I think the 6th proviso to section 92 of the Evidence Ordinance should also make admissible "such extrinsic evidence of surrounding circumstances as may be required to show in what manner the language of a document is related to existing facts", to quote the words of Lord Davey in *Balkishen Das* v. *Legge*. Evidence unobjectionable in so far as section 92 is concerned clearly establishes the following facts: that (1) Liew was only a market runner working in the Chung Khiaw Bank, not a building contractor or purchaser of property in the ordinary course of business; (2) he gave no notice of the assignment of the contract at any time to the defendants; (3) he gave to the plaintiff as consideration a sum of only $5,000 for a contract on which the plaintiff had paid $15,000; (4) when the $24,000 instalment fell due on 23rd June he was as completely unconcerned about its payment as if he had no interest in the contract; (5) it was plaintiff who undertook further liability on 25th June by his letter to defendants; (6) it was the plaintiff himself who on 7th July paid $5,000 for the extension of time; (7) it was the plaintiff who was anxious to pay the balance of $19,000 before 31st July and (8) who on 28th July found that sum; (9) when the defendants purported on 1st September to rescind the contract and forfeit the part payments, Liew was still not in the least concerned as to the fate of the contract; (10) it was the plaintiff who raised the sum of $19,000 which was deposited with his own solicitors (Messrs. Lovelace & Hastings) on 8th

September, and with the defendants' solicitors (Messrs. Shearn Delamore & Co.) from 19th September to 19th November; (11) it was the plaintiff who accepted deposits from prospective purchasers; and (12) it was the plaintiff, and not Liew, who instituted proceedings.

Furthermore there is evidence provided by the agreed bundle of documents, covering a period from 24th March 1956 to 22nd January, 1957. Such documentary evidence clearly establishes that the plaintiff's conduct at all times was that of a person having rights and obligations under the contract with the defendant. Such conduct completely negatives his having assigned absolutely all his rights under that contract to Liew. Therefore, even if the plaintiff had been debarred from giving evidence of any oral agreement or statement contradicting the terms of the so-called "Sale Deed" of 10th May, 1956, there was nevertheless abundant proof aliunde, by documentary and other admissible evidence, of a state of affairs showing that, whatever the real transaction might have been between the parties, it certainly was not an assignment to Liew of all the plaintiff's rights and benefits under the contract between himself and the defendants. In other words, it has been proved by extrinsic evidence of surrounding circumstances that the language of the document in truth had no relation whatever to existing facts. The defendants' managing director giving evidence has said as follows: "At the time we took P4 we did not know that there was no value attached to it. It is worth money. It is good for my case. I was prepared to pay $1,500 to buy evidence." In the light of this admission and of the surrounding circumstances it is impossible to hold that the defendants took the assignment from Liew as *bona fide* purchasers for value in good faith.

For the reasons I have stated above, I hold that by their purported purchase of all Liew's rights the defendants have not succeeded in divesting the plaintiff of his right of action. This defence also fails.

The only remaining question, therefore, is: what is the proper quantum of damages that should be awarded to the plaintiff ? He in effect had contracted to purchase only 21 lots from the defendants at $3,000 each, since one lot was to be sold back to defendants for $3,000, and a house erected thereon by the plaintiff for defendants at an agreed price of $8,600. Had the contract been duly performed, the plaintiff would also have parted with 8 lots before 31st July at no profit to himself. That would leave him only 13 lots at his disposal, but from evidence of his means it is doubtful whether he had the funds to put up 13 houses. It would therefore not be correct to assess damages on the basis of the profits per house which the defendants themselves had been able to make, using their own available moneys for the purpose. (The finding of the learned trial Judge on this point is $1,350 per house). On the other hand, once 8 lots had been sold and buildings were starting to rise, there would not have been any difficulty for the plaintiff in finding other ready buyers for lots in the immediate vicinity. He had been able to obtain a price of $3,000 per lot when driven to sell, and I am of opinion that, under more favourable conditions, he should have been able to realise quite easily a profit of $500 to $800 per lot sold even as vacant land. Taking $650 as the mean figure, the plaintiff's loss of profits on 13 lots would amount to $8,450. I do not think he would necessarily incur any loss by putting up a house for the defendants on the 22nd lot at a price of $8,600, and I propose therefore to make no deduction from the figure of $8,450 as the amount of damages which the defendants should pay as compensation.

Accordingly I would set aside the judgment of the Court below and order (1) that the defendants do repay the sum of $20,000 to the plaintiff with interest thereon at the rate of 6 per cent per annum with effect from 1st September 1956 till date of payment; (2) that the plaintiff do recover from the defendants the sum of $8,450 as damages for breach of contract; (3) that the defendants do pay the plaintiff's taxed costs of this appeal and in the Court below and (4) that the plaintiff's deposit of $500 lying in Court be paid out to him.

Order accordingly.

Solicitors: *Lee & Thean; Shearn, Delamore & Co.*